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Electric By Miller, Inc. *and* International Brotherhood of Electrical Workers, Local 584, affiliated with International Brotherhood of Electrical Workers, AFL–CIO. Case 17–CA–22667

February 16, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 3, 2004, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Electric by Miller, Inc., Miami, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 16, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Frank A. Molenda, Esq., for the General Counsel.
Donald W. Jones, Esq., for the Respondent.
Mr. Roger K. Canada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Oklahoma, on September 14, 2004, pursuant to a complaint that issued on May 26, 2004, and that was amended on August 13, 2004.[1] The complaint alleges that the Respondent interrogated and threatened employees in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) and revoked the cell phone privileges of and discharged John R. Carter because of his union activities and refused to hire Brent Sloan because of his union affiliation in violation of Section 8(a)(3) of the Act. The Respondent denies all violations of the Act. I find that the Respondent did violate Section 8(a)(1) of the Act by threatening closure and did unlawfully discharge Carter.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Electric by Miller, Inc. (the Company), a corporation, is an electrical contractor providing services to the building and construction industry from its facility in Grove, Oklahoma. The Company, in conducting its business, annually purchases goods and supplies valued in excess of $50,000 from suppliers located outside the State of Oklahoma. The Respondent stipulated and admitted, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Electrical Workers, Local 584, affiliated with International Brotherhood of Electrical Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Company, a nonunion contractor, is owned by President Kathy Miller who began operating it in 2003 following a divorce. Miller and her former husband had operated an electrical company with Miller serving as business manager and her husband providing the electrical expertise. On December 13, 2003, Miller hired Mike Harrell, an electrician who possesses a contractor's license, which is required in order for a firm to operate in Oklahoma. Harrell testified that he was operations manager. The complaint alleges and the answer admits that he was vice

[1] All dates are in 2004 unless otherwise indicated. The charge in Case 17–CA–22667 was filed on March 22 and was amended on May 17 and on August 11.

president of operations. Harrell was formerly a member of the Union.[2]

In late December 2003, union member John R. Carter sought and obtained permission from Roger Canada, organizer for the Union, to seek work with this nonunion company. Carter was hired on December 31, 2003. He performed various jobs, including estimating. The alleged unfair labor practices herein all occurred during the last week of Carter's employment, which ended January 16. There is a sharp dispute as to whether Carter was fired or quit. Operations Manager Harrell's employment ended contemporaneously with that of Carter. Harrell, an acknowledged supervisor, is not protected by the Act, and there are no allegations relating to him. The event that immediately preceded the terminations or quits of Carter and Harrell was a conversation between President Miller and organizer Canada on the morning of January 16.

B. Facts

John R. Carter testified that he was hired on December 31, 2003, by Harrell. He acknowledges speaking with President Miller before he began work. Miller testified that she alone made hiring decisions. Miller testified that she was not fully satisfied with Carter's work or conduct. She purportedly heard that Carter had been rude when performing work at her hairdresser's shop, but she did not speak to him about this. She received a report that Carter carried a firearm in his zippered day planner. She asked him to cease doing so. Carter testified that he complied with her request. Miller testified that she saw the firearm again, but there is no evidence that she mentioned the matter. On Wednesday, January 14, Miller claims that she requested Carter to handle an emergency call and to take with him the two apprentices with whom he was working. Carter testified that Miller requested that he estimate three potential jobs, and his timesheet reports "looking at bids." He did not take the apprentices. Despite the foregoing alleged conduct and disobedience, Miller took no action against Carter. When asked why she took no action, Miller testified that "[i]t wasn't the right time, yet."

Carter had, on January 7, contacted organizer Roger Canada and asked him to meet for lunch with him and the Company's two apprentices, the total work force of the Company. They met on January 14. In that meeting, Canada spoke of the benefits of the Union's apprenticeship program, and the two apprentices expressed interest. Because they worked for a nonunion company, Canada did not request that they join the Union. He did request that they sign cards authorizing the Union to represent them in dealings with the Company, and they did sign authorization cards. Canada explained that he would need them to provide documentation of their prior experience by Friday in order for the apprenticeship committee to review it prior to voting to accept them into the program. After lunch, the apprentices returned to the jobsite and Carter, consistent with Miller's instructions, continued to survey the potential jobs.

Harrell had been in Tulsa on the morning of January 14. He returned to Grove by way of the jobsite and discovered the apprentices working without a journeyman. They reported to him their meeting with organizer Canada. Their report was garbled. Rather than reporting that there would be a vote regarding their acceptance into the apprenticeship program, they reported that there would be a vote for union representation at the Company on Friday.

When Carter returned to the company office, he was asked to meet with Miller and Harrell. Harrell stated that he "did not think very highly of" Carter leaving two apprentices to work by themselves. Section 158:40-5-1 of the Oklahoma Electrical Industry Regulations provides that "[a]pprentice electricians must be under the direct 'on-the-job supervision' of a licensed journeyman or contractor, when engaged in the work of an apprentice." Miller stated that "it was her fault that I had been pulled off of the job to go look at other projects." There was discussion regarding obtaining another journeyman on an "as needed" basis. Carter stated that he knew of someone and would call him. He did so on the office telephone, and Miller was aware of this. Miller denied that Carter named Brent Sloan, the individual whom he called. Assuming Carter did name Sloan, I find that Miller did not recall Sloan's name. Carter did not provide Sloan's address or telephone. Thereafter, in their meeting, Harrell stated that he "wasn't happy with the Union meeting that took place at lunchtime." He reported what the apprentices had told him regarding a vote on Friday. Carter testified, and Miller did not deny, that Miller stated that "she would end up locking her doors if there was a vote, and—or if the shop tried to go Union." Carter then explained that the report Harrell had received was wrong, that the meeting related to the apprenticeship program, and that the apprentices were to get their documentation regarding experience to him by Friday so he "could get it to Roger [Canada] by Friday evening, to get an emergency meeting of the apprenticeship committee on Saturday, to just formalize that they could get in the apprenticeship training."

Following this meeting, Carter was driving to Tulsa. Sloan returned the call that Carter had previously made. Carter, while driving, received the call on a company cellular telephone that he testified he had been given by Miller on one unspecified night because "we were having phone tag problems that night." Carter asked whether Sloan would be interested in working on an as needed basis if given a day or two of notice. Sloan replied that he would. Before Carter reported that Sloan was interested, he received a call from Harrell who told him not to have the electrician come in the following day because there was no work. Harrell testified that Miller had called and told him to tell Carter not to have the electrician come in. She then asked whether the electrician was "union." Harrell answered that he did not know, but assumed that he was. None of the foregoing was communicated to Carter. Harrell simply told Carter not to ask the electrician to come in because there was no work. Shortly thereafter, Carter received a call from Miller repeating what Harrell had to him, and Carter responded that Harrell had

[2] The Respondent objected to testimony by Harrell who provided an affidavit to the Regional Office. The parties stipulated to receipt of GC Exh. 6, a letter from counsel for the Respondent to the Regional Director, the Regional Director's response pointing out that Harrell's affidavit was obtained prior to when the Respondent obtained counsel, and an Office of Special Litigation memorandum noting that Oklahoma does not prohibit ex parte contact with former supervisors. I reaffirm my overruling the objection to receipt of Harrell's testimony.

already called and that he knew there was no work. Carter never gave Sloan a day or time that he would be needed. Miller called Carter again and told him "from then on, I needed to leave the Company cell phone in the shop." Carter acknowledged that he was aware that it was company policy to leave the cell phones "in the office at night, to charge up for the next day."

The following afternoon, Thursday, January 15, Miller raised the matter of the Union. Carter again assured her that the conversation Canada had with the apprentices related to the apprenticeship program. Harrell became involved in the conversation and suggested speaking to the apprentices, who were in the break room playing ping-pong. Although Carter recalled that an apprentice confirmed that the conversation with Canada related to the apprenticeship program, I credit Harrell's recollection that the apprentices stated that they understood that they were signing an agreement to organize the Company. At that point, Carter explained that the cards they had signed were necessary for entry into the apprentice program. Harrell and Carter confirm that Miller stated that she would not go Union, "I will shut the doors before I do."

Miller, when asked when she first learned that someone had been "signing up cards" initially answered, "Mike Harrell told me on Wednesday." Miller did not address the specifics of the Thursday afternoon conversation in her testimony. When asked about any discussion with employees about the Union on Thursday, she answered, "Not much about the Union, just—we were watching them play ping-pong, mostly." Miller did admit that there was a conversation on Thursday afternoon, that she stated that she could not afford to operate as a union contractor, and that Harrell and Carter agreed with her. She did not deny stating, "I will shut the doors." Miller's assertion that she could not afford to operate as a union contractor was unsupported by any statement relating to profitability. According to her testimony, she showed figures establishing a monetary loss to Harrell the following morning. On cross-examination, Harrell and Carter answered that they did not perceive Miller's statements to be a threat but, rather, "a statement of the true facts." When asked whether what Miller stated, "was a true fact," Carter answered, "As far as I knew, that was a true fact, yes sir." There is no evidence that Miller advised Carter of any objective facts relating to the financial condition of the Company.

Harrell said that he would call Canada and ask him to meet to explain the situation. Miller did not object. Harrell called Canada who said he would come by "first thing" the following morning. Whether Miller invited Harrell and Carter to join her for drinks at the VFW Post after work is of no significance. It is undisputed that there was a meeting the following day.

On Friday, January 16, Harrell testified that he was late and, shortly after arriving, became involved in a telephone conversation. Miller claimed that both she and Harrell were at work on time and that she had a conference with Harrell in which she showed him the profit and loss figures since his employment began and informed him that he "needed to do better." Carter arrived around 7 a.m. He observed Miller arrive shortly before Canada.

Canada arrived at a little before 9 a.m. He observed Miller entering the office building. Harrell was on the telephone. Carter and Canada waited for Harrell in front of the building. Harrell joined them and explained that Miller was concerned about the Union seeking to organize her Company. Canada stated that the cards the apprentices had signed were "no big deal." He showed Harrell a draft "small works agreement" for smaller contractors that set wage rates at 20 to 25 percent less than the contractual wage rate. Harrell noted that the Company was paying more than that, and Canada asked whether the Company was paying any benefits. Harrell replied, "No." They then went inside where Harrell introduced Canada to Miller.

Harrell recalled that Canada began talking to Miller about the apprenticeship program, and she responded that she was "not going to be organized . . . . I will shut the business down." Harrell recalled asking Miller to "listen to what Roger [Canada] has to say," and that Canada tried to give her some information to look over, but she wouldn't take it. Harrell left. Later, he heard Miller tell Canada to please leave, that she was going to shut her business down.

Carter recalls that, immediately after Harrell introduced Canada to Miller, she stated, "I am not signing anything. I don't want to be Union. I am not going Union." He heard Canada reply, "That is not what I am up here to do. I am up here to try to help and get this smoothed over." As Canada was asking Miller to look at the draft of the small works agreement, Carter left. He recalls that Harrell followed him. They went to Harrell's office. About 5 minutes later, Miller went to the back of the building and, after 2 minutes, returned and asked Canada to leave, stating that "she was closing out her business and shutting her doors."

Canada recalled that at the beginning of their conversation Miller informed him that she was "not going to sign anything." Canada responded that the Union did not want her to sign anything, that the Union understood that she could not afford to do so, that Harrell had asked him to come to meet her. He attempted to show her the small works agreement, but she refused. Miller, who Canada believed was becoming emotional, repeated that she was not going to sign anything and would go out of business. Canada responded, "Ms. Miller, we don't want you to sign anything," and explained that the Union wanted to provide competent journeymen to "show what we have to offer," that the Union was "not ready for you to sign anything . . . [that] [a]ll we are here to do is help." Canada recalled that Harrell came into the room to "try to settle things down," and asked him how long the Union would provide journeymen, and that he replied, "We can work with Ms. Miller however long it takes, as long as . . . the Union does not feel that it is being taken advantage of." Miller left the office and walked to the back of the building. She returned and went to a file cabinet and then asked Canada to leave, stating that she was going "to shut her doors."

Miller testified that Canada began the meeting by asking whether she knew the apprentices had signed "some cards." Miller says she responded, "No, what do you mean?" Canada said that it meant "you are a Union shop." Miller states that she answered that she did not know what Canada was talking about and did not believe that "my guys signed anything." Canada

told her to ask them. She testified that she went to find them, but only located one apprentice who told her that he had signed "what looked like a magazine subscription card to get some information about the school." Miller returned to the office and stated to Canada that she did not know what to do because she did not "know anything about the Union." She testified that Canada informed her that she would have to close and "put an NLRB sign on my front door," and that she "couldn't re-open for six months." Miller testified that she was crying. She told Canada that she did not know what he was talking about, that he lunged across her desk saying, "We are here to help you." She responded that she did not want his help and that she did not know what was going on. At that point, Canada left. Miller testified that Canada had some documents in his front shirt pocket but that he said noting about them. When asked whether she knew why Canada told her she would have to close, she answered, "I don't know."

The foregoing versions of the meeting, although differing in detail, establish that Canada, although advised by Harrell that Miller was concerned about the Union's organizational objectives, sought to get her to commit to use electricians supplied by the Union. Although Canada, in his testimony, sought to put the best face possible upon the presentation that he made to Miller, his attempt to show her the small works agreement, his offer to "show what we have to offer," and his reference to working with her for "however long it takes, . . . as long as the Union does not feel that it is being taken advantage of," reveal an ultimate, although not immediate, organizational objective. Whether Canada told Miller that she was "a union shop," he certainly implied that the Union wanted her Company to become a union shop in the future. Miller's testimony that Harrell and Carter agreed with her that she could not afford to operate as a union shop on Thursday and that, on Wednesday, Harrell had mentioned "signing up cards" belie her denial to Canada that she knew nothing about the signing of cards and her assertions that she did not "know anything about the Union" or what he was talking about. I credit Canada and find that, even though he never asked Miller to sign anything, she stated that she was not going to sign anything and was going "to shut her doors." I do not credit Miller's testimony that Canada told her she would have to close for 6 months and post an NLRB sign on the door.

Harrell testified that about 15 or 20 minutes after Canada left, Miller came to his office where he and Carter were conferring regarding their work. She said, "Mike, you and J. R. pack your things. You need to get out of here. I am shutting my business down." Harrell began packing his belongings. As he was doing so, he contemplated what he would do next. Thinking that he might bid a project himself, he approached Miller and asked if he could purchase from her the drawings that he had recently obtained in Tulsa. Miller replied that he could not, that she would bid the jobs herself, "I am staying in business."

Carter corroborated Harrell, testifying that Miller came to Harrell's office and told them that "she was closing down the business and locking her doors, and [to] pack our tools and get off of the premises."

Miller denied informing Harrell and Carter that she was closing. She testified that she asked Harrell what they should do, that Harrell replied, "We'll have to close down," and that "they started moving out their furniture." Harrell had brought a desk with him when he was employed. There is no evidence that Carter had any furniture.

Mary Rayburn, who keeps the books for the Company, testified that Miller asked her to be present at 10 a.m. on Friday in order to attend the meeting with Canada. When she arrived, Miller was "distraught." Miller told her that Canada, who had departed, had come at 9 instead of 10 a.m. Rayburn says she overheard a conversation in which Miller asked Harrell, "What are we going to do?" and that he replied, "If it were me, I would shut the doors and open back up the next day, under a different name." Rayburn mentioned nothing about Harrell beginning to move his furniture out. She was asked whether she discussed or heard what Harrell's "status was going to be." Rayburn answered, "At that time, I don't recall." She did recall that Miller later told her that Harrell was leaving. She did not mention Carter being present.

I do not credit Rayburn and Miller. The fact that Miller asked Rayburn to be present establishes that she did not trust Operations Manager Harrell. Her claim that she asked for advice regarding what to do from Harrell, whom she did not trust, is incredible. Her alleged claim of asking for advice is even more unbelievable if I were to credit her assertion that she had, 2 hours earlier, met with Harrell and informed him that he "needed to do better." According to Miller, after Harrell gave his advice "to close down," he and Carter "started moving out their furniture." Rayburn mentioned nothing about anyone starting to move anything.

Miller, in an entry dated January 16 in Harrell's personnel file, wrote, "We were told by Mr. Canada that because we are refusing to sign the contract we would have to close. Mike packed up his stuff and left." The entry in Carter's file dated January 16 reports that "Roger [Canada] came and said unless I sign the contract we would have to close our doors. J. R. packed up all of his tools and left." Neither entry reports any conversation in which Harrell purportedly told Miller what she should do. Miller testified that, although Canada had a paper in his pocket, he did not mention it. She did not testify to any demand by Canada that she sign a contract or anything else. She did not testify that she refused to sign anything, although Canada credibly testified that, although never asked to sign anything, Miller stated throughout the meeting that she was not going to sign anything.

Miller's credibility is further undermined by the purported contemporaneous notes that she testified she made regarding Carter's various derelictions. An entry dated January 2 reports that one of the apprentices informed her that Carter was carrying a firearm on his person and in the company van "at all times." The entry continues, reporting that Carter brought "what looked like a zippered day planner into the office every day. One day he unzipped the bag and showed me the gun." Carter's employment began on December 31, 2003. The references to "at all times," "every day," and "one day" belie an entry contemporaneously made on January 2, the day following New Years Day and only 2 days after Carter's employment began.

I credit Carter and Harrell and find that Miller informed them that she was closing the business and that they were to

leave. Despite telling Carter and Harrell that she was closing, Miller continued to operate. Neither apprentice was terminated. Miller hired two journeyman electricians, Leon Jackson and Levi Kirkwood, on January 22.

On Friday, January 16, Brent Sloan went to organizer Canada for permission to work at Electric by Miller. Canada told him to "hold up . . . because things aren't going very well there."

C. Analysis and Concluding Findings

1. The 8(a)(1) allegations

The complaint alleges that the Respondent threatened to close if the employees selected the Union as their collective-bargaining representative, announced that it was closing because of the employees' union activities, informed employees that it would be futile to select the Union as their collective-bargaining representative, and interrogated employees regarding their union membership and sympathies. There is no evidence of a separate threat of futility. The General Counsel argues that the threats of closure also constituted threats of futility. I find that the far more serious threats of closure subsume any implied threat of futility. There is no evidence of any interrogation on January 14 when the apprentices informed Harrell of their meeting with Canada. There is no evidence of any coercive interrogation on the afternoon of January 15 when employee Carter attempted to clarify that Canada's dealings with the apprentices related to the apprenticeship program. The only evidence of interrogation on January 16 is Miller's testimony. In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), when commenting upon the Board's adoption in *Rossmore House*, 269 NLRB 1176 (1984), of the case by case analysis set out in *Blue Flash Express*, 109 NLRB 591 (1954), the Board noted that, in *Blue Flash* no coercion was found where "unit members, whose sympathies were unknown to the employer, were individually questioned by the employer in an attempt to evaluate the union's claim of majority status." The only testimony before me is that Miller, who had been assured by employee Carter on Thursday that what the apprentices signed related to the apprenticeship program. Whatever Canada said prompted her to speak with an apprentice regarding what he had actually signed. Neither apprentice testified. The General Counsel has failed to establish that any questioning by Miller was coupled with a threat or was otherwise coercive. I shall recommend that the allegations of futility and interrogation be dismissed.

Threats of closure constitute "hallmark" violations of the Act. *General Fabrications Corp.*, 328 NLRB 1114 (1999). Miller did not deny stating to Carter on Wednesday, with no reference to economics, that "she would end up locking her doors if there was a vote, and—or if the shop tried to go Union." On Thursday, without citing any financial data, Miller stated that she could not afford to go Union and "I will shut the doors before I do." The testimony of Carter and Harrell that they did not consider that statement to be a threat but "true facts" does not alter their coercive effect. "[W]hat is important is not any witness' subjective mental response to an alleged threat, but, rather, whether or not on an objective basis the alleged threat should be viewed as tending to coerce. The fact that a threat may not succeed in actually frightening its subject is largely irrelevant." *Norton Concrete Co.*, 249 NLRB 1270, 1274 (1980). I find the foregoing constituted threats of closure in violation of Section 8(a)(1) of the Act. On Friday, Miller falsely stated to Harrell and employee Carter that she was closing the business. In falsely stating that she had closed the business in order to discharge employee Carter, the Respondent violated Section 8(a)(1) of the Act.

2. The refusal to hire Brent Sloan

The complaint alleges that the Respondent refused to hire Brent Sloan because of his union affiliation. Sloan never applied for work with the Respondent. Carter inquired whether Sloan would be willing to work on an as needed basis if he was given notice in advance regarding when he would be needed. He replied that he would be. Sloan was not given a report date or time. It is undisputed that there was no work available for him on Thursday or Friday, January 15 and 16. The only contact by the Respondent with Sloan was by Carter, acting on behalf of Miller pursuant to his suggestion. The Respondent did not have Sloan's address or telephone number. The General Counsel's brief does not address the undisputed evidence that, on Friday, union member Sloan went to organizer Canada for permission to work at a nonunion company. Canada told him to "hold up . . . because things aren't going very well there." Sloan complied with the direction to "hold up." He did not thereafter contact the Respondent, and the Respondent had no application from him. I shall recommend that this allegation be dismissed.

3. The discharge of Carter

The Respondent argues that Carter was a supervisor under the Act because Oklahoma regulations require that apprentices' work be supervised by certified electricians and because he effectively recommended that Sloan be employed. Miller testified that no one did hiring for the Company other than herself. There is no probative evidence contradicting that testimony. An employee's suggestion of persons for employment does not establish "discretion to make hiring decisions." *Adscon, Inc.*, 290 NLRB 501 (1988). Miller directed the work force, meeting with employees in a morning "huddle" regarding the plan for the day, and she scheduled the remainder of the week so that she would "know what I can send them on." Oversight, "'the way a journeyman would tell an apprentice' what to do," does not establish supervisory authority as defined in the Act. *Debber Electric*, 313 NLRB 1094, 1096 (1994). There is no probative evidence that Carter was a supervisor.

The Respondent's answer alleges that the Union sought to place "union agents in managerial positions" and "entrap the Employer." The Respondent's brief argues that the Union "fraudulently" induced the apprentices to sign authorization cards and is engaging in the "fraudulent . . . use of . . . NLRB charges." No apprentice testified. There is no evidence that Operations Manager Harrell was an agent of the Union. A supervisor's philosophical support or opposition towards employees' exercise of Section 7 rights is immaterial. Section 8(c) of the Act provides that the expression of opinion, unaccompanied by threats or promises, does not violate the Act. The Act is violated when an employer interferes, restrains, or coerces employees with regard to their right to choose to engage in pro-

tected activity or to choose not to do so. The Board has, for over a decade, rejected arguments that "salting" constitutes entrapment. *Sunland Construction Co.*, 309 NLRB 1224, 1225 at fn. 12 and 1246 (1992).

The parties, at various times, mentioned charges filed by the Respondent and a charge filed by the Union alleging that the termination of Harrell was unlawful. Those charges are not the subject of a complaint and are not before me. They are not relevant to this proceeding.

In assessing the evidence under the analytical frame work of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Carter, who arranged and attended the meeting between Canada and the apprentices, was engaged in union activity and that the Respondent was aware of that activity. Animus is established by Miller's statements that she would lock "her doors if there was a vote, and—or if the shop tried to go Union" and would "shut the doors." The Respondent's assertion that its position was based upon economic rather than philosophical grounds does not alter the existence of antiunion animus. Carter's termination was an adverse action affecting his employment. I find that the General Counsel has carried the burden of proving that union activity was not only a substantial and motivating factor for Respondent's action, but was *the* motivating factor for its action. *Manno Electric*, 321 NLRB 278 (1996). The Respondent has not rebutted the General Counsel's prima facie case.

The Respondent contends that Carter quit, that he and Harrell simply packed up their equipment and left following Miller's meeting with Canada. In a letter dated October 21, 2004, 2 days after its brief was filed, the Respondent cites *Nations Rent, Inc.*, 342 NLRB No 19, decided on June 29, 2004, and states that *Nations Rent* held that "the General Counsel presented no evidence to show that the employee, after being aware that the Respondent persisted in the view that the employee had left on his own, took any steps to claim or notify the employer that he had not in fact left of his own free will." I disagree. *Nations Rent* involved an employee, Bickel, who stated to the respondent that he was going on strike and then stated, "I'm gone." When Bickel received a letter accepting his resignation, he wrote the respondent "emphatically stating that he had not resigned," and the respondent did not respond. Thus, "the respondent's acquiescence in Bickel's last word" negated the conclusion that he had been discharged. Id., slip op. at 2. In this case, there was no correspondence. The Union filed a charge alleging discharge, as does the complaint. The Respondent's defense is that Carter quit. I have not credited Miller's testimony in that regard. *Nations Rent* is inapposite.

The Respondent further contends that the Respondent would have discharged Carter at some undetermined time in the future because of his conduct including rudeness to a customer, carrying a gun, and disobeying Miller's directive by leaving the apprentices. Miller's testimony that "[i]t wasn't the right time, yet," in response to the question, "So, why wasn't he gone before January 16?" establishes that none of the foregoing purported derelictions, even if established, were viewed by Miller as justifying discharge. There is no probative evidence relating to rudeness. I have credited Carter's testimony that he ceased carrying a firearm when requested to do so as well as his testimony that he left the apprentices when Miller directed him to survey potential jobs. I reject any contention that Carter would have been terminated at some undetermined time in the future for reasons unrelated to his union activity, all of which reasons purportedly existed prior to his termination on January 16.

It is undisputed that the Respondent began hiring new employees the week following Miller's falsely telling Carter that she was closing the business. The Respondent, by discharging Carter because of his union activities, violated Section 8(a)(3) of the Act.

The complaint also alleges that the Respondent discriminatorily revoked the cell phone privileges of Carter. Carter admitted that it was the Respondent's policy that cell phones be left at the facility overnight in order to be charged. He was, on one occasion, told to take a cell phone because "we were having phone tag problems that night." Miller's reminder that "from then on, I needed to leave the Company cell phone in the shop," simply confirms that she made a one-time exception to that policy. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By threatening its employees with closure of the business if they selected the Union as their collective-bargaining representative and falsely announcing closure of the business in order to effectuate the discharge of a prounion employee, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging John R. Carter because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged John R. Carter, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from January 16, 2004, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Electric by Miller, Inc., Grove, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Threatening its employees with closure of the business if they selected the Union as their collective-bargaining representative and falsely announcing closure of the business in order to discharge an employee who engaged in activities on behalf of the Union.

(b) Discharging employees because of their activities on behalf of the International Brotherhood of Electrical Workers, Local 584, affiliated with International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John R. Carter full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John R. Carter whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination, and within 3 days thereafter, notify John R. Carter in writing that this has been done and that the termination will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(e) Mail to all former employees employed by the Respondent at any time on or after January 14, 2004, and post at its office and jobsites in and around Grove, Oklahoma, copies of the attached notice marked "Appendix."[4] Such notice shall be mailed to the last known address of each former employee. Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region and shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 3, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten that we will close the business if you select the Union as your collective-bargaining representative or announce that we have closed the business in order to discharge any of you who choose to engage in activities on behalf of the Union.

WE WILL NOT discharge any of you because of your activities on behalf of the International Brotherhood of Electrical Workers, Local 584, affiliated with International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer John R. Carter full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the termination of John R. Carter and, within 3 days thereafter, notify him in writing that this has been done and that the termination will not be used against him in any way.

ELECTRIC BY MILLER, INC.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."